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IN THE

Supreme Court of the United States

October Term, 1964

No. 389

LIONEL MARQUEZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. KRIEGER
Attorney for Petitioner

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IN THE

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October Term, 1964

No.

LIONEL MARQUEZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Lionel Marquez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on May 14, 1964.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1964. A timely petition for a re-hearing and for a re-hearing en banc was made. The former was denied on June 8, 1964, and the latter on June 16, 1964. On the tenth day of July, 1964, Mr. Justice William J. Brennan, Jr., granted an order extending the time of the petitioner to file his petition for a writ of certiorari to and including August 15, 1964. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Question Presented

The question specifically raised by the petitioner Lionel Marquez, is:

Should certiorari be granted, as there is a conflict between the United States Court of Appeals for the Second Circuit and the United States Court of Appeals for the Fifth Circuit, as to what concealment of a wagering operation constitutes circumstantial evidence of intent to commit a wilful violation of the pertinent tax statutes?

D. Statutes

The statutes involved are:

United States Code, Title 26, Sections 4401, 4411, 4412, 7203, 7262 and 7272. All of the foregoing are set forth in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

Eight defendants were named in a one count information charging a conspiracy to violate Title 26, United States Code Sections 4401, 4411, 4412, 7203, 7262 and 7272. Each defendant was also named in a separate two count information. The first count charged a substantive violation of failure to pay the special wagering tax imposed by Section 4411. The second count charged a substantive violation of failure to register under Section 4412, and the trial of all the foregoing informations was ordered consolidated.

The jury was charged solely as to the substantive informations and disagreed as to one defendant, found two defendants not guilty and the remaining four defendants guilty without a specification of wilfulness. The petitioner was found guilty with a specification of wilfulness and a mistrial was declared as to the conspiracy information. He was thereafter sentenced to six (6) months imprisonment and fined Five Thousand ($5,000.00) Dollars for violating Section 4411. He was also fined One Thousand ($1,000.00) Dollars together with a Fifty ($50.00) Dollar penalty for violating Section 4412. All fines were deemed to be committed fines.

The petitioner was the only defendant who appealed, and his conviction was affirmed by the United States Court of Appeals for the Second Circuit.

F. Reasons for Granting Writ

There is a conflict between the Circuits as to what concealment of a wagering operation constitutes circumstantial evidence of intent to commit a wilful violation of the pertinent tax statutes.

The decision in the United States Court of Appeals for the Fifth Circuit in *Edwards* v. *United States,* 321 F. 2d 324 (5th Cir. 1963), is not reconcilable with the conclusion of the United States Court of Appeals for the Second Circuit in affirming the conviction of the petitioner. The conviction of Marquez for a wilful violation of Sections 4401 and 4411 of Title 26, United States Code, was affirmed in the Court below primarily upon the judicial finding that evidence of concealment of the gambling operation was evidence of the intent to violate Federal wagering tax laws.

No analysis of concealment as circumstantial evidence of intent in this area can be made without resort to *Ingram* v. *United States,* 360 U.S. 672, 3 L. Ed. 2d 1503, 79 S. Ct. 1314 (1959). The concealment which was at the crux of the decision in *Ingram* was described in the margin of the Supreme Court's opinion.

> "2. Some of the items found when the headquarters of the operation was raided in 1957 were clearly indicative of the magnitude of the enterprise. Among the items found on that occasion were some 2,400 scratch pads of the type used in numbers operations, thousands of coin wrappers, a police alarm radio, with a secret code of police calls, two high frequency radios, and six fictitious automobile registrations with license tags. Petitioner Ingram was alleged to have stated in 1955 that the 'business is down to about' $3,500 per day. * * *

3. * * *

4. There was extensive evidence, for example, that participants in the enterprise used false license plates on their automobiles, took evasive routes to the 'check-up headquarters' of the operation, used false names on occasion, and attempted to bribe local law enforcement officers." (Footnotes 2 and 4, *Ingram* v. *United States, supra,* p. 674.)

Edwards v. *United States, supra,* disclosed that a gambling business consisting of a lottery operation of large size was conducted from the home of one of the defendants. A search of that home uncovered all the necessary paraphernalia for a lottery operation which would normally be in the custody of the bank, as well as two short-wave radios. One of the defendants when arrested, had $11,000. in his possession in a bag. At various times the defendant had been seen carrying a five gallon can in the course of his lottery operations. Such a can was found concealed under a building next door to the defendant's residence, stuffed with lottery records. Surreptitious meetings at which the defendant received packages were also observed. The Fifth Circuit found that the total of this activity was insufficient to spell out that state of mind necessary for the wilful violation of the wagering tax statutes.

Utilizing *Edwards* and *Ingram,* as two litmus paper tests applied to the petitioner's case, the reaction is one of consistency with Edwards rather than Ingram. Marquez was allegedly engaged in a policy operation on one block in Harlem in New York City. The taking of numbers on the block was open. Any passerby could play at either of two readily accessible locations. The Internal Revenue agent

who placed bets with writers with whom Marquez was prosecuted, merely walked up to them and gave his order. There were times, it is conceded, when an inopportune appearance by police caused a temporary halt in their activities. Beyond that, Marquez was seen once parading down the middle of the crowded street with an undescribed walkie-talkie radio in his hand. It was left to conjecture as to whether the radio functioned, as to whether he was merely playing an adolescent game, and as to whether the radio had any connection whatsoever with the policy operation. Some testimony concerning attempted bribery of police officers was equivocal and not illuminating.

The petitioner does not argue in his application for this writ of certiorari for a review of the finding that he violated the wagering tax statutes. He specifically seeks to narrow the issue presented to this Court to the element of wilfulness in his conviction.

Section 4401 of Title 26 provides for an imposition of a tax on wagers and requires the payment of said tax by anyone engaged in the business of accepting wagers. Section 4411 is a $50.00 occupational tax on anyone liable for the payment of the tax under Section 4401. Section 4412 is a registration requirement of anyone obliged to pay the tax. Section 7203 specifies the penalties incurred where the failure to pay the tax is wilful. Section 7262 sets forth that it is criminal for a person to do any act which would make him liable for the special tax imposed by Section 4401 without having paid such special tax.

The criminality under Section 7262 can be established even though there be a lack of knowledge of the wagering tax laws and this has been designated as a non-wilful

violation. *Burke* v. *United States*, 287 F. 2d 117 (9th Cir. 1961).

Section 7272 provides a penalty for non-wilful failure to register whereas 7203 specifies the penalties for a wilful failure to do so.

Within the purview of the aforesaid statutes and the evidence as presented at the trial, it is submitted, that there was a prosecutorial failure to establish that degree of proof necessary to support a conviction for a wilful violation of Title 26, Sections 4411 and 4412.

Ab initio the Congress created a differentiation between a wilful violation and a mere violation. Such a distinction has long been the source of difficulty for as was said in *Hargrove* v. *United States*, 67 F. 2d 820 (5th Cir. 1933) at 823:

> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. . . . Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."

"Willful" as used in Section 7203 has been construed in terms of active knowledge. The elements of a willful violation are knowledge on the defendant's part of an obligation and a deliberate refusal to comply. For as has been

stated in *United States* v. *Martell,* 199 F. 2d 670 (3rd Cir. 1952) at 672:

> "The rule concerning the state of mind required for conviction for this offense is discussed in United States v. Murdock, 1933, 290 U.S. 389, 394-396, * * * and Hargrove v. United States, 5 Cir., 1933, 67 F. 2d 820, 823, * * *. Willfulness is an essential element of the crime proscribed by 145(b). It is best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the government which he seeks to conceal."

And in *United States* v. *Simon,* 241 F. 2d 308 (7th Cir. 1957) at 312:

> "Regardless, however, of the connotation which may be given to the word 'willful', we think the proof was ample to support a finding against the defendant on this issue. Defendant had knowledge of the law and intentionally refused to comply * * * ".

Analogous to the facts in the case at bar are those in *United States* v. *McGonigal,* 214 F. Supp. 621 (U.S.D.C. Del. 1963). There the defendant was charged with writing wagers on behalf of an unknown person engaged in the business of accepting the same and wilfully failing to pay the gambling tax stamp. The Court held that there was no showing that the defendant knew of the necessity of purchasing a gambling tax stamp. That although there may have been a strong suspicion of guilty knowledge stemming from frequent association with gamblers and that resulting therefrom, he should have known of the tax requirement. However, the Court held that such suspicion could be regarded as nought save speculation, rather than proof and in its opinion set forth that (at 622):

> "In order for the jury to return a verdict of guilty, it must not only find that the defendant was engaged in the business of a writer, but that his failure to purchase a $50 gambling tax stamp was willful. In order for a criminal act to be willful, it must not only be committed deliberately and knowingly, but with a bad motive or evil intent. United States v. Palermo, 259 F. 2d 872 (3rd Cir. 1958). Simply stated, in order for the Government to convict here, it must prove beyond a reasonable doubt that the defendant deliberately committed the specified violation with the intention of getting away with it."

and at 623:

> "There is no direct evidence that this defendant knew of the requirements of the law. And in view of the use of the word 'willful' in the statute, there is of course, no presumption to that effect.
>
> . . . As elsewhere pointed out, in order to convict here, the Government must produce satisfactory proof that the defendant willfully failed to purchase the $50 gambling tax stamp. Thus, the Government had to prove that the defendant knew that as a condition precedent to engaging in the writing of numbers the stamp had to be purchased."

It is submitted that there cannot be a violation of Section 4411, within the purview of Section 7203 unless the following elements are found to have been present.

(1) actual knowledge of an awareness on the part of the defendant of an obligation imposed by law, and

(2) a deliberate or intentional refusal or failure on the part of the defendant to comply with the law.

An analysis of the facts hereinabove set forth manifest that the prosecution failed to establish these elements.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER
Attorney for Petitioner
Lionel Marquez

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 342—September Term, 1963

(Argued March 11, 1964 Decided May 14, 1964.)

Docket No. 28779

UNITED STATES OF AMERICA,

Appellee,

—v.—

LIONEL MARQUEZ,

Defendant-Appellant.

Before:

SMITH, KAUFMAN and MARSHALL,

Circuit Judges.

Appeal from a judgment of conviction on an information charging wilful failure to register and pay the wagering excise tax, entered on a jury verdict of guilty after a trial in the United States District Court for the Southern District of New York. Thomas F. Murphy, *Judge.* Affirmed.

JOHN W. MILLS, Asst. United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New

York, on the brief) (Andrew T. McEvoy, Jr., and John S. Martin, Jr., Asst. United States Attorneys of counsel), *for Appellee.*

ALBERT J. KRIEGER, New York, N. Y. (Theodore Krieger, on the brief), *for Defendant-Appellant.*

MARSHALL, *Circuit Judge:*

Lionel Marquez appeals from his conviction on a two-count information charging wilful failure to pay the special tax imposed on persons in the business of accepting wagers and failure to register as a person so engaged, based on a jury verdict of guilty. 26 U. S. C. A. §§4401, 4411, 4412, 7203, 7262, 7272.[1]

The informations against appellant and seven others were consolidated for trial, and eight were named in a one-count information charging a conspiracy. The substantive

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[1] Section 4401 of the Internal Revenue Code imposes an excise tax on wagering transactions, and makes liable for its payment persons who are "engaged in the business of accepting wagers" and on those who conduct "any wagering pool or lottery." Section 4411 imposes a special $50 tax "on each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." Section 4412 requires anyone required to pay special tax to register his name, place of residence, and certain other information with the Internal Revenue Service. Section 7262 provides for a fine of $1,000 to $5,000 to be imposed on persons who are liable for the special occupational tax under section 4411 and fail to pay it; section 7272 imposes a penalty of $50 on persons who fail to register under section 4412. Finally, section 7203, which is a general statute not related solely to the wagering tax provisions, declares that any person required to "pay any . . . tax . . . make a return . . . keep any records . . . or supply any information," who wilfully fails to do the required acts, shall be guilty of a misdemeanor and upon conviction be fined up to $10,000, imprisoned up to one year, or both.

counts were first submitted to the jury, which disagreed as to one defendant, found two not guilty, four guilty without a specification of wilfulness and appellant guilty with a specification of wilfulness. Thereafter, Judge Murphy dismissed the conspiracy information as to six of the defendants and declared a mistrial as to appellant and one other defendant. Appellant and three others were then sentenced on the substantive counts.[2]

Appellant's first ground for reversal goes to the sufficiency of the evidence. He claims both that he was not shown to be liable for any of the wagering taxes, because, under the decision in *United States* v. *Calamaro,* 354 U. S. 351 (1957), he was in the category of a "pick-up man" in the numbers operation, and that, in any event, the evidence failed to establish the necessary element of wilfulness to justify conviction of a violation of section 7203.

The Government's case showed that for two months prior to January, 1962, agents of the Internal Revenue Service conducted an exhaustive investigation of reported wagering activities in one block of New York City. The surveillance was by binoculars, cameras and other viewing equipment. During that period one agent, acting undercover, placed wagers with several of the defendants and obtained other incriminating evidence. The undisputed testimony showed an extensive gambling operation, commonly referred to as the "numbers game" in the area. It was stipulated that none of the defendants had ever filed the special occupational tax return, paid the tax, filed a wagering tax return, paid that tax or registered. None of the defendants

[2] One of the defendants did not appear for sentence. His bail was revoked and a bench warrant issued.

testified. The only witness for the defense was a retired New York Police Captain who testified as an expert on the operation of the "numbers" business.

The testimony showed further that day after day appellant Marquez was almost constantly in view giving instructions to others as to where to go in the block, where to stand and when to stop taking wagers. He was seen giving an envelope to city policemen in a police car, and using a walkie-talkie to communicate with other persons in the vicinity. He was also seen smoothing out the crumpled sheets showing the wagers made and supervising the daily movement of boxes. On one occasion appellant accepted a wager himself to accommodate a bettor who was in a hurry. The jury might reasonably find from the evidence that appellant supervised the actions of all the persons engaged in handling the bets at this location. There was no direct evidence to show that appellant or any of the defendants knew of the tax and registration requirements.

In *United States* v. *Calamaro*, 354 U. S. 351, 363 (1957) the Supreme Court recognized the workings of the numbers racket as follows:

> A numbers game involves three principal functional types of individuals: (1) the 'banker,' who deals in the numbers and against whom the player bets; (2) the 'writer,' who, for the banker, does the actual selling of the numbers to the public, and who records on triplicate slips the numbers sold to each player and the amount of his wager; and (3) the 'pick-up man,' who collects wagering slips from the writer and delivers them to the banker. If there are winnings to be distributed, the banker delivers the required amount to the writer, who in turn pays off the successful players.

Appendix A

We cannot agree that only the conclusion that appellant was a pick-up man was possible under this evidence. Calamaro "was a pick-up man for a Philadelphia banker receiving for his services a salary of $40 a week, but having no proprietary interest in this numbers enterprise." Therefore, both the Court of Appeals and the Supreme Court found that Calamaro "no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits." (354 U. S. at 355, 236 F. 2d at 184, 185.) The record in the instant case shows convincingly that appellant over a considerable period of time was daily "engaged in receiving wagers," was in control of the operation at the buildings where they were centered, and personally directed the efforts to conceal it.

Although we do not pass on the question whether this evidence might warrant a conclusion that appellant had a proprietary interest in the operation, we think it certainly establishes him as the chief "writer" at the location and hence made him liable for the tax.

With regard to the question of the wilfulness necessary to sustain a conviction under 26 U. S. C. A. §7203, both parties rely on the Supreme Court's decision in *Ingram* v. *United States*, 360 U. S. 672 (1959). In that case, as in this one, there was no direct evidence to show that any of the four defendants who carried their case to the Supreme Court knew of the tax and registration requirements. All four defendants were convicted of a conspiracy to evade and defeat the wagering taxes imposed by sections 4401 and 4411, in violation of 18 U. S. C. A. §371 and 26 U. S. C. A. §7201, and two, Ingram and Jenkins, were convicted of

violations of sections 7203 and 7272. Only the conspiracy convictions were challenged in the Supreme Court. The evidence showed that Ingram and Jenkins were the principals in a large-scale numbers operation conducted over a period of years in the city of Atlanta, while Smith and Law, the other two petitioners, were minor clerical personnel employed by the organization which conducted the gambling operation. The conspiracy convictions of Ingram and Jenkins were affirmed while the judgments were reversed as to the others on grounds of insufficiency of evidence. The Court's majority, speaking through Mr. Justice Stewart, said as to Ingram and Jenkins that "they were entrepreneurs in a vast and profitable gambling business. They were clearly liable for the special taxes and registration requirements that the Federal Government has imposed upon the operators of that kind of business. *United States* v. *Kahriger*, 345 U. S. 22, 97 L. Ed. 754, 73 S. Ct. 510. Not only did they wilfully fail and neglect to pay these taxes, but they conspired to conceal the operation of the business and the source of the income upon which the tax is imposed."

The Court reversed the conspiracy convictions of the other two petitioners, noting that they were not themselves liable for the various taxes imposed on wagering operations In view of this, there was insufficient proof that Smith and Law knew of the liability of their superiors for the taxes, and hence insufficient evidence that they conspired with Ingram and Jenkins to wilfully evade and defeat those taxes. Such circumstances as "the intimate connection of Smith and Law with the operation of the lottery itself, their cooperation in conducting it secretly, and their

apparent knowledge that it was conducted at a profit" were held to be "colorless as to the vital issue of knowledge on the part of Smith and Law that their superiors owed federal wagering taxes."

In the case before us, as in *Ingram*, the vital issue is knowledge of the wagering tax requirements, which is a prerequisite for conviction of a "wilful" failure to pay the tax and register as it is for a guilty verdict under the conspiracy statute. See *United States* v. *Murdock*, 290 U. S. 389 (1933); *United States* v. *Martell*, 199 F. 2d 670 (3 Cir. 1952). Marquez's situation differs from that of Smith and Law in *Ingram*, in that he was personally liable for those taxes, while it differs from that of Ingram and Jenkins in that he does not concede the sufficiency of the evidence to sustain a conviction of the substantive offense of violation of §7203 of the Internal Revenue Code. On balance, however, we believe the import of the *Ingram* decision to be that evidence of attempts to conceal the operation of a lottery by one who participates in its operation and is liable for the taxes imposed by Congress suffices to show the element of knowledge circumstantially and to justify conviction of a wilful failure to pay the tax and to register. In this, we are in accord with the great weight of authority on this topic. See *United States* v. *Minker*, 312 F. 2d 632 (3 Cir.), *cert. denied*, 372 U. S. 953 (1963); *United States* v. *Whiting*, 311 F. 2d 191 (4 Cir. 1962), *cert. denied*, 372 U. S. 935 (1963); *United States* v. *Marchionte*, 309 F. 2d 435 (6 Cir. 1962); *United States* v. *Woodson*, 303 F. 2d 49 (6 Cir. 1962); *Rosen* v. *United States*, 293 F. 2d 938 (5 Cir. 1961); *United States* v. *Apuzzo*, 245 F. 2d 416 (2 Cir. 1957). Cf. *United States* v. *Viale*, 312 F. 2d 595 (2 Cir. 1963).

Appendix A

Edwards v. *United States*, 321 F. 2d 324 (5 Cir. 1963), *rehearing en banc pending*, on which appellant relies, is not in point. In that case, the evidence showed only that defendants were engaged in a lottery operation and did not register or pay the excise tax. There was no proof of actions designed to conceal the operation by the principals thereof.

Further light on the question of wilfulness in the context of section 7203 is shed by *Spies* v. *United States*, 317 U. S. 492 (1943). The question involved here was not directly at issue in that case, its holding being that proof of wilful failure to file a return and pay a tax did not alone justify felony conviction for violation of section 145(b) of the Internal Revenue Code of 1939, the predecessor of section 7201, although it was sufficient to justify a misdemeanor conviction under section 145(a) of 1939 Code, the predecessor of section 7203. But the opinion noted that "wilful is a word of many meanings, its construction often being influenced by its context," which "may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return." Again, the court indicated that the "affirmative wilful attempt" necessary for a felony conviction "may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such

conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime."

In this case the evidence of Marquez's behavior at the site of the gambling operation was certainly such as to establish wilfulness under the *Spies* rationale, even though the purpose may also have been the concealment of the operation from the scrutiny of city police.

Appellant in this court strenuously objects to testimony of government agents concerning his talking to New York City policemen on one occasion and in taking something out of his pocket and giving it to two other policemen on another occasion. No objection was made when the testimony was given. The claim here is both too late and without merit. Evidence of other crimes is admissible when relevant to proof of the crime charged. *United States* v. *Eury*, 268 F. 2d 517, 520 (2 Cir. 1959). Proof of appellant's efforts to conceal the wagering operation was here admissible to show "bad purpose," an element of wilfulness set forth in *Spies*. The objections to the cross-examination of defendant's expert witness are similarly unfounded.

During the course of its deliberations the jury propounded the following question to Judge Murphy:

> Can you clarify for the jury the question as to which category or categories under the law other than bankers and writers is liable or subject to the 1954 federal law operative in this case?

He answered:

> The statute that imposes the tax of $50 makes no reference to bankers, to writers, to pickup men. It

> merely states that there shall be imposed a special tax of $50 per year to be paid by each person who is engaged in receiving wagers either on his own behalf or on behalf of some other person. That's the total statement of who is liable.
>
> The test is whether the person is engaged in the business of receiving wagers either on his own behalf or on behalf of somebody else. In other words, the tax is imposed on the person who accepts the bet or who has a proprietary interest in the gambling operation, for example, the owner or someone else who is in a supervisory capacity like a boss.

Appellant objected that this instruction was improper in the light of *Calamaro* and *Ingram,* particularly the language "a person having a supervisory interest such as a boss." Appellant was given an exception. Thereafter, the jury posed another question:

> Can you kindly make the specific distinction embodied in the following question:
>
> Is it your particular charge to the jury that a person acting in a suprevisory capacity in the numbers business is responsible under the law to register and pay the tax in the same fashion as the boss, a person with a proprietary interest, or a person who takes bets?

Judge Murphy's answer was one word—"No." Thus, the jury was instructed that a person can act in a supervisory capacity and yet not be liable for the tax. If anything, this charge was more favorable to the defendants than was warranted.

This was clearly a case for the jury. The instructions, including the supplementary charge, were without error.

Appendix A

The repeated questions by the jury demonstrated a determination to understand the law involved. The verdict in this type of multiple defendant case—disagreement as to one, guilty with wilfulness as to one, guilty without wilfulness as to four and not guilty as to two—demonstrates careful deliberation and delineation.

The judgment is affirmed.

APPENDIX B

Statutes Involved

Title 26, United States Code, Sections 4401, 4411, 4412, 7203, 7262, 7272:

TITLE 26—INTERNAL REVENUE CODE

§ 4401. Imposition of tax.

(a) Wagers.

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.

In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of resi-

dence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him. (Aug. 16, 1954, 9:45 a. m., E. D. T., ch. 736, 68A Stat. 525; Sept. 2, 1958, Pub. L. 85-859, title I, § 151 (a), 72 Stat. 1304.)

§ 4411. Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. (Aug. 16, 1954, 9:45 a.m., E. D. T., ch. 736, 68A Stat. 527.)

§ 4412. Registration.

(a) Requirement.

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.

Where subsection (a) requires the name and place of residence of a firm or company to be registered,

the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.

In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. (Aug. 16, 1954, 9:45 a.m., E. D. T., ch. 736, 68A Stat. 527.)

§ 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times, required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, 9:45 a.m., E. D. T., ch. 736, 68A Stat. 851.)

§ 7262. Violation of occupational tax laws relating to wagering—failure to pay special tax.

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being

liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000. (Aug. 16, 1954, 9:45 a. m., E.D.T., ch. 736, 68A Stat. 862.)

§ 7272. Penalty for failure to register.

(a) In general.

Any person (other than persons required to register under subtitle E, or persons engaging in a trade or business on which a special tax is imposed by such subtitle) who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

(b) Cross references.

For provisions relating to persons required by this title to register, see sections 4101, 4412, 4455, 4722, 4753, 4804(d), and 7011.

(Aug. 16, 1954, 9:45 a.m., E. D. T., ch. 736, 68A Stat. 866; June 30, 1958, Pub. L. 85-475, § 4 (b) (8), 72 Stat. 260; Sept. 2, 1958, Pub. L. 85-859, title II, § 204 (6), (7), 72 Stat. 1429.)

APPENDIX C

Judgment of United States Court of Appeals

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine and sixty-four.

Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LIONEL MARQUEZ,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it is hereby affirmed.

A. DANIEL FUSARO
Clerk

E COPY

Supreme Court, U.S.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 389

LIONEL MARQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A; II R. 28a–32a)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1964. Petitions for rehearing and rehearing en banc were denied on June 16, 1964. By order of Mr. Justice Brennan, the time for filing a petition for a writ of certiorari was extended to and including August 15, 1964. The petition for a writ of certiorari

[1] "R." refers to the printed record which is contained in two volumes. "Tr." refers to the typewritten transcript of the trial proceedings which has been lodged with the Clerk.

744-031—64——1

was filed on August 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to support the jury's finding that petitioner's violation of the wagering tax statutes was willful.

STATUTES INVOLVED

26 U.S.C. 4401 provides in pertinent part:

> (a) Wagers.
>
> There shall be imposed on wagers * * * an excise tax equal to 10 percent of the amount thereof.
>
> * * * * *
>
> (c) Persons liable for tax.
>
> Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

26 U.S.C. 4411 provides:

> There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. 4412 provides in pertinent part:

> (a) Requirement.
>
> Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> * * * * *

26 U.S.C. 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who wilfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 U.S.C. 7262 provides:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

26 U.S.C. 7272 provides in pertinent part:

> (a) In general.
>
> Any person * * * who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

* * * * *

STATEMENT

In a two-count information filed in the United States District Court for the Southern District of New

York, petitioner was charged with willfully failing to pay the special tax on the business of wagering imposed by 26 U.S.C. 4411 and willfully failing to register as a person subject to such special tax as required by 26 U.S.C. 4412. Similar informations were filed against seven other persons who were tried jointly with petitioner. Petitioner was convicted by a jury, was sentenced to imprisonment for six months, was fined a total of $6,000, and was penalized $50. The court of appeals unanimously affirmed (Pet. App. A).[2]

The evidence pertinent to petitioner's contention in this Court may be summarized as follows:[3] In November and December of 1962, a numbers wagering operation was conducted on West 144th Street, between 8th Avenue and Bradhurst Avenue, in New York City. The wagering operations were conducted at two locations on West 144th Street: in the hallway of number 309, a tenement building, and in number 303, a store (II R. 2, 13; Tr. 419). Every day approximately 200 persons entered these two buildings for short visits (II R. 3, 6). Outside the entrance of each of these two buildings, one of the defendants tried with petitioner

[2] A second information charged a conspiracy between petitioner and the seven other defendants to commit the substantive offenses. The trial judge dismissed this charge as against six of the co-defendants, and declared a mistrial as to petitioner and another co-defendant (I R. 39).

[3] All of the recited evidence is condensed from the trial testimony of various agents of the Internal Revenue Service. One operated undercover and placed several bets (II R. 12-14). Others observed the premises in question from a rented room, with the aid of binoculars, a motion picture camera, and a tripod-mounted telescope (II R. 1, 5-6; Tr. 621).

was always posted. If the operators were unsure of a potential customer, his admission to the store might be barred (Tr. 444–445) but, if they knew him, he would be admitted by the person standing outside, and sometimes even encouraged to enter (Tr. 449–450, 459). Upon the appearance of any suspicious stranger in the vicinity, the activities would cease (Tr. 468, 470). Payoffs on winning numbers were made in 309 (Tr. 442, 490, 492).

At regular intervals each day a person would arrive at 309, the man who had been standing outside would enter the building and emerge with a third, and the three of them would meet a similar group at 303. Then some of them, always with one person carrying a metal box, would go around the corner to an apartment building on 8th Avenue (I R. 4; II R. 6, 17; Tr. 497). Sometimes this activity was initiated by a signal from petitioner or another defendant, rather than by the arrival of a person at 309 (II R. 4, 8; Tr. 489–490). Petitioner was observed almost every day as a participant in the activities (I R. 3; II R. 3, 7, 9, 12, 14).

On December 6 petitioner and defendant Pena were observed at one end of the store counter in 303. They were sorting three-by-five-inch slips of paper and arranging them into various piles, while another defendant accepted bets at the other end of the counter. At one point, while the man accepting bets was busy with a customer (the undercover agent), a second customer entered and hurriedly announced that he wished to bet a certain number. Petitioner told the defendant taking bets: "That's all right, Teddy, I will take

care of this one." Petitioner then transcribed on a slip of paper the amount of the bet, the desired number, and the initials of the customer. He accepted the customer's money and placed the slip on one of the piles he had been sorting (I R. 6–8; II R. 14–16).

Later that day, the man posted in front of 303, defendant Hunter, stopped a customer (the undercover agent) who was trying to enter and told him "You can't go in now," pointing to two policemen up the street. Defendant Pena started to emerge from 303 with a metal box, but petitioner, who was also outside the entrance, said "Go back inside with that box until I find out about these fellows." The two police officers entered 307 and 309. Hunter asked petitioner if he knew them, and petitioner replied, "Yes, they are all right." Petitioner then walked over to 309, entered and remained inside a short time. When he returned, he told Hunter, "It's okay to let them again now," and told Pena, "Okay, you can take the box around now" (I R. 8–9).

On December 12 petitioner was observed talking to someone on a "walkie-talkie" radio (Tr. 721–722). On December 22 a police car stopped in front of 303. Someone came out of the store, talked to the driver, then re-entered the building. Petitioner then emerged from the store, talked to the driver, removed something from his overcoat pocket, and handed it through the car window (I R. 4; II R. 8).

On December 23 petitioner approached the man standing in front of 303, took him by the arms and moved him next to the buzzer on the wall of the

building. Petitioner then approached the man standing by 309 and placed him closer to 311. He appeared to speak angrily to both men (I R. 5; II R. 3, 8–9; Tr. 747).

On December 27 petitioner was seen "bawling out" Pena (I R. 5). On December 29 Pena came around the corner and walked up to petitioner at 303. He handed petitioner what appeared to be a "wad of bills." Petitioner then entered an automobile and drove away (I R. 5; II R. 10).

ARGUMENT

The evidence was sufficient to support the jury's finding that petitioner's failure to register and pay the tax was willful. The gambling operation was purposefully concealed as well as possible in view of its nature and scope. All wagers were transacted within the buildings which were guarded by regular shifts of lookouts. Whenever a policeman or stranger appeared in the vicinity, the activity was halted. The evidence showed that the precautionary measures were taken under petitioner's direction. The evidence indicating a proprietary or managerial interest on petitioner's part would have justified conviction for the felony of willfully attempting to evade and defeat the payment of taxes. See *Ingram* v. *United States*, 360 U.S. 672; *United States* v. *Minker*, 312 F. 2d 632 (C.A. 3), certiorari denied, 372 U.S. 953. It was *a fortiori* sufficient to sustain the conviction for the misdemeanor of willfully failing to register and pay the tax.

Petitioner contends that the decision of the court of appeals conflicts with the decision of the Fifth Circuit in *Edwards* v. *United States,* 321 F. 2d 324. But the original *Edwards* decision has been reversed on rehearing *en banc*. *Edwards* v. *United States,* Nos. 19,827 and 19,828, decided July 10, 1964. The original decision in *Edwards* merely rejected the contention that proof of (1) participation in a wagering business and (2) non-payment of the tax would suffice to support a conviction for willful non-payment. The *en banc* opinion considered the evidence supporting the finding of willfulness in that case and sustained the jury's verdict.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

SEPTEMBER 1964.

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